A

Lim Kuen Kuen v Hiew Kim Fook & Anor

HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO 33-291-1992
MOHD HISHAMUDIN JC
16 MAY 1994

B

Family Law *— Matrimonial property — Employees Provident Fund and gratuity payments — Whether matrimonial assets — Law Reform (Marriage and Divorce) Act 1976 s 102*

C ***Family Law*** *— Financial obligations — Maintenance payments — Moneys from Employees Provident Fund — Injunction to restrain respondent from disposing of moneys until final disposal of application for ancillary relief — Whether moneys precluded from attachment — Employees Provident Fund Act 1991 s 51*

D The applicant and respondent were married in 1970 but separated in 1988. The applicant filed a divorce petition in October 1992 and had asked for, inter alia, ancillary relief. The respondent retired in April 1993 at the age of 55. The applicant applied for an interlocutory injunction to restrain the respondent from disposing of his Employees Provident Fund ('EPF') and gratuity payments until final disposal of her application for ancillary relief under the divorce petition on the E grounds that the respondent was likely to deprive her of her rights in relation to those sums of money. The application was made pursuant to s 102 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') and the applicant requested that 50% of the EPF and gratuity payments due to the respondent be placed in fixed deposit.

F **Held**, allowing the application:

(1) Both the EPF and gratuity payments are matrimonial assets, ie assets acquired during the marriage by the sole effort of one party to the marriage. If the EPF contributions were not deducted from the wages or salary of the respondent, they would have gone to G providing for himself and the family.

(2) Section 51 of the Employees Provident Fund Act 1991 only prevents EPF moneys from being attached while it is still standing to the credit of an employee. Once the EPF fund is paid out to an employee upon retirement, that amount changes in character and ceases to come under s 51. Therefore, s 51 did not preclude the H court from attaching the respondent's EPF moneys as the application was not to prevent the respondent from receiving the payment but only concerned the EPF fund once it was already paid to the respondent.

(3) The respondent was ordered to deposit half of his EPF and I gratuity payments with his solicitors to be kept in a client's account as a fixed deposit until disposal of the applicant's application for ancillary relief pursuant to the divorce petition.

[**Bahasa Malaysia summary**

Pemohon dan responden telah berkahwin dalam tahun 1970 tetapi berpisah dalam tahun 1988. Pemohon telah memfailkan suatu petisyen perceraian dalam bulan Oktober 1992 dan telah memohon, antara lain, untuk relief sampingan. Responden telah bersara dalam bulan April 1993 pada umur 55 tahun. Pemohon telah memohon untuk suatu injunksi interlocutori untuk menghalang responden daripada menggunakan bayaran wang Kumpulan Wang Simpanan Pekerja ('KWSP') dan ganjarannya sehingga keputusan muktamad mengenai permohonannya untuk relief sampingan dibuat di bawah petisyen perceraiannya atas alasan bahawa responden mungkin melucutkan haknya berkenaan dengan jumlah wang itu. Permohonan itu telah dibuat di bawah s 102 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu') dan pemohon telah memohon supaya 50% daripada jumlah wang KWSP dan ganjaran yang kena dibayar kepada responden diletakkan di dalam simpanan tetap.

Diputuskan, membenarkan permohonan itu:

(1) Kedua-dua bayaran KWSP dan ganjaran merupakan aset hal-ehwal suami isteri, iaitu aset yang telah diperolehi semasa perkahwinan itu melalui usaha tunggal satu pihak kepada perkahwinan itu. Jika caruman KWSP itu tidak ditolak daripada upah atau gaji responden, wang itu akan digunakan untuk menyara keluarga dan dirinya.

(2) Seksyen 51 Akta Kumpulan Wang Simpanan Pekerja 1991 hanya menghalang wang KWSP daripada ditahan apabila wang itu masih berada pada kredit seseorang pekerja. Sebaik sahaja tabung KWSP itu dibayar kepada seseorang pekerja apabila beliau bersara, jumlah itu bertukar sifatnya dan tidak lagi tertakluk kepada s 51. Oleh itu, s 51 tidak menghalang mahkamah daripada menahan wang KWSP responden kerana permohonan itu bukan bertujuan untuk menghalang responden daripada menerima bayaran itu tetapi hanya berkenaan dengan tabung KWSP itu selepas ia dibayar kepada responden.

(3) Responden telah diperintahkan supaya mendeposit setengah daripada bayaran KWSP dan ganjaran dengan peguamcaranya untuk disimpan di dalam suatu akaun klien sebagai simpanan tetap sehingga penentuan permohonan pemohon untuk relief sampingan di bawah petisyen perceraian itu.]

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 02–158–94.]

Notes

For cases on matrimonial property, see 7 *Mallal's Digest* (4th Ed) paras 1731–1748; [1989] Mallal's Digest 851–852; [1991] Mallal's Digest 1182–1185; and [1992] Mallal's Digest 1034–1039.

A For cases on financial obligations, see 7 *Mallal's Digest* (4th Ed) paras 1619–1673; [1989] Mallal's Digest 850; [1990] Mallal's Digest 656–659; and [1991] Mallal's Digest 1174, 1176–1178.

Cases referred to

B 1 *Ong Chin Ngoh v Lam Chin Kian* [1992] 2 SLR 414 (folld)
2 *Lam Chih Kian v Ong Chin Ngoh* [1993] 2 SLR 253 (folld)

Legislation referred to

Employees Provident Fund Act 1991 s 51
Law Reform (Marriage and Divorce) Act 1976 s 102

C

Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the applicant.
Cedric Miranda (*Jagjig Singh & Co*) for the respondent.

Cur Adv Vult

D **Mohd Hishamudin JC**: In this application, the applicant/petitioner applied to this court for an interlocutory injunction to restrain the respondent, his servants, or agents from disposing of his Employees Provident Fund ('EPF') and gratuity payments until final disposal of her application for ancillary relief under the divorce petition. This application was pursuant to s 102 of
E the Law Reform (Marriage and Divorce) Act 1976 ('the Act') which reads:

> Power of court to set aside and prevent dispositions intended to defeat claims to maintenance.
>
> (1) Where —
>
> F (a) any matrimonial proceeding is pending; ...
> ...
> the court shall have power on application —
>
> (i) if it is satisfied that any disposition of property has been made by the spouse or former spouse or parent of the person by or on whose behalf the application is made, within the preceding three years, with the
> G object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his or her spouse of any rights in relation to that property, to set aside the disposition; and
> (ii) if it is satisfied that any disposition of property is intended to be made with any such object,
>
> H to grant an injunction preventing that disposition.
>
> (2) For the purposes of this section —
>
> 'disposition' includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred or encumbered but does not include a disposition made for money or money's worth to or
> I in favour of a person acting in good faith and in ignorance of the object with which the disposition is made;
>
> 'property' means property of any nature, movable or immovable, and includes money.

The applicant and respondent were married in 1970. In 1988, they executed a deed of separation and separated. They had three children and only one was still a minor. The respondent worked in a bank as a bank officer and retired in April 1993 at the age of 55. The applicant had filed a divorce petition in October 1992 but no date had been fixed for the hearing of the petition. In her petition, the applicant had asked for ancillary relief. The applicant, in her affidavit, stated that she believed that unless the respondent was restrained from disposing of his EPF and gratuity payments, the latter was likely to deprive her of her rights in relation to a portion of those sums of money.

Encik Balwant Singh Sidhu, learned counsel for the applicant, in his submission, brought to my attention s 76(3) of the Act which reads:

> Power for court to order division of matrimonial assets.
>
> The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

He submitted that if the respondent were allowed to dispose of the gratuity and EPF payments at this stage, it might defeat his client's claim for future maintenance and for a share of the matrimonial assets.

The nature of EPF contributions is explained in the case which I shall refer to in due course. Gratuities are lump sum payments made by employers to their employees upon retirement. The amount depends on the salary and the length of service of the employee. The higher the salary and the longer the length of service, the more is the amount of gratuity paid. Gratuities, as the term implies, are money paid as a token of gratitude to the employee for the services rendered to the employer. To most retired employees, the gratuity payment means much to them and to their families.

It is my view that both the EPF and gratuity payments are matrimonial assets, that is to say, assets acquired during the marriage by the sole effort of one party to the marriage. As for EPF payments, I am fortified in my view by the decision of Chan Sek Keong J in *Ong Chin Ngoh v Lam Chin Kian*[1] where at p 417 of the judgment it was held:

> CPF [Central Provident Fund] contributions are compulsory. They are part of the wages or salaries of workers and employees. They constitute a valuable source of funds upon their retirement, whether for themselves alone or for themselves and their families. They are matrimonial assets if acquired during the marriage. If the CPF contributions were not deducted from the wages or salary of a worker, they would have gone to providing for himself and the family. They are assets acquired by the sole effort of the married worker during the marriage.
>
> The worker's rights in his CPF fund is not subject to normal legal process. The account holder himself may not draw it out until he has reached 55, except for certain prescribed purposes. He may not assign the benefit of it to anyone so long as it is not withdrawn. No creditor may attach it and even his bankruptcy will not vest the fund in the Official Assignee for distribution to his creditors. The CPF fund is inviolable, except to the extent set out in the Central Provident Fund Act (Cap 36, 1991 Ed). There is a moratorium on its integrity, until it is withdrawn.

A Notwithstanding these legal restrictions and disabilities, I cannot see why, for the purpose of determining the corpus of the matrimonial assets in divorce proceedings, the court may not take into account the value of the CPF fund of each of the parties to the marriage. Of course, the court will have no power to order any part of the fund to be paid to the wife, where the husband has no legal capacity to withdraw the fund. But, the legal capacity to use the fund has nothing B to do with its legal nature as an asset of the marriage. The fact that the husband may nominate a person other than the wife to take the fund does not change its character. The husband has the same power to dispose of his other assets. It cannot be suggested that the disposing power of the husband makes such assets any less matrimonial assets if acquired during the subsistence of a marriage.

C The above decision was upheld by the Singapore Court of Appeal in *Lam Chih Kian v Ong Chin Ngoh*.[2] At p 259 of its judgment the court held:

> In our view the fact that the fund in a member's CPF [Central Provident Fund] account is subject to restrictions as to its use and disposal until he reaches the age of 55 and is inviolable except to the extent set out in the CPF Act does not make it any less of an asset. If the fund is accumulated during the marriage then it D constitutes an asset acquired during the marriage and therefore within the ambit of s 106(3) [of the Women's Charter (Cap 353)]. On this, we agree with the reasoning of Chan Sek Keong J set out in the passage quoted above.

The scheme of the Central Provident Fund (CPF) (Singapore), as governed by the Central Provident Fund Act (Cap 36, 1991 Ed) (Singapore), is E almost similar to the scheme of our EPF as governed by the Employees Provident Fund Act 1991. Section 106(3) of the Women's Charter (Cap 353, Rev 1985) (Singapore) is in pari materia with s 76(3) of the Act.

Learned counsel for the respondent, Encik Cedric Miranda, however, submitted that this court has no power to make the order prayed for in relation to the EPF payment by reason of s 51 of the Employees Provident F Fund Act 1991 which reads:

> Contribution and deposits not to be assigned or attached.
>
> Notwithstanding anything to the contrary contained in any other written law —
>
> (a) no sum deducted from the wages of a member of the Fund under section 48; G
> (b) no amount payable by the employer as his contribution; and
> (c) no amount standing to the credit of a member of the Fund,
>
> shall be assignable, transferable, liable to be attached, sequestered, levied upon, for, or in respect of, any debt or claim whatsoever, nor shall the Official Assignee be entitled to or have any claim on any such sum or amount: ...

H He contended that by virtue of the above provision, this court is precluded from making an order attaching or freezing the money which the respondent/husband had with the EPF. With due respect, this argument was misconceived. The applicant was not asking this court to make such an order. The purpose of the present application was not to prevent the I respondent from receiving the EPF payment. Nor was the application made with the object of getting the EPF Board to withhold payment to the respondent or to pay to the applicant a portion of the amount in the EPF standing to the credit of the respondent. The applicant's application, as can

be seen in the prayer, only concerned the EPF fund once it was already paid to the respondent. This application sought to prevent the respondent from disposing of the EPF payment once the money was in his hands until the applicant's application for ancillary relief was disposed of. Moreover, I am of the opinion that once the EPF fund is paid out to an employee upon retirement, that amount ceases to be a 'sum deducted from the wages of a member' or an 'amount payable by the employer as his contribution' or an 'amount standing to the credit of a member of the Fund'. In other words, it changes in character and no longer comes under either category (a), (b), or (c) of s 51.

Encik Balwant Singh, at the end of his submission, however, informed the court that (presumably with s 76(4) of the Act in mind) he was asking the court to preserve not the whole but only 50% of the EPF and gratuity payments due to the respondent; and that the amount so preserved be placed in a fixed deposit. Accordingly, I granted the application as prayed (with the necessary modifications) and I ordered that the respondent do deposit the preserved half with his solicitors to be kept in a client's account as a fixed deposit until disposal of the applicant's application for ancillary relief pursuant to the divorce petition. It was further ordered that the respondent shall inform the senior assistant registrar within two weeks of the said amount being deposited with his solicitors.

Having made the above order (in chambers), the respondent applied for further arguments in open court. I agreed to the application. Unfortunately, on the day of the hearing for further arguments (15 February 1994) counsel for the respondent failed to turn up. Encik Balwant Singh, learned counsel for the applicant and also mentioning on behalf of counsel for the respondent, informed the court that the learned counsel had assumed that no arrangement had been made for me to come back to Shah Alam (from Alor Setar) to hear this case. He requested for an adjournment. As the reason given for the application for an adjournment was (with respect) wholly devoid of any merit (indeed, I was perturbed by the fact that learned counsel could make such an assumption; there was no basis whatsoever for him to make such an assumption), I rejected the application for a postponement and confirmed the order that I had made in chambers on 3 June 1993.

Application allowed.

Reported by Anne Khoo